

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 18, 1991 appellant, a 32-year-old postal distribution clerk, filed an occupational disease claim alleging that work factors caused neck and bilateral arm pain. OWCP accepted her claim for a cervical strain, bilateral carpal tunnel syndrome, bilateral ulnar nerve compression and left ulnar nerve transposition. On July 7, 1994 appellant was reemployed as a full-time modified clerk. By decision dated October 20, 1994, OWCP determined that her actual earnings in the position represented her wage-earning capacity. It reduced her wage-loss compensation benefits to zero as the actual earnings in the modified position were equal to the current pay rate of the job held at the date of the injury.

On September 14, 2010 appellant filed a claim for compensation for the period September 2 through 10, 2010. Pursuant to the National Reassessment Plan (NRP), there was no work available within her restrictions. Appellant filed claims for wage-loss compensation for subsequent periods.

On December 14, 2010 OWCP denied modification of the October 20, 1994 loss of wage-earning capacity (LWEC). In a decision dated June 7, 2011, the hearing representative affirmed the December 14, 2010 decision.

In a letter dated June 7, 2012, appellant requested reconsideration of the June 7, 2011 decision, arguing that the original LWEC determination was in error because it was based on an odd-lot or make-shift job. She noted that the light-duty job to which she was assigned was designed for her particular needs and was not a regular position readily available to other employees.

By decision dated August 10, 2012, OWCP denied appellant's request for reconsideration. It found that she had not provided new and relevant medical evidence sufficient to warrant further merit review of the prior decision.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.² Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.³ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁴

² 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that the actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing that they do not fairly and reasonably represent the employee's wage-earning capacity).

³ *K.R.*, *id.*; *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984); *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975).

⁴ *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

Modification of a standing loss of wage-earning capacity determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been trained or otherwise vocationally rehabilitated or the original determination was erroneous.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶ There is no time limit for appellant to submit a request for modification of wage-earning capacity determination.⁷

ANALYSIS

OWCP considered appellant's letter of June 7, 2012 as a request for reconsideration. Appellant, however, asserted that the original LWEC decision was erroneous because the modified position on which it was based was tailored to conform to her unique physical restrictions and did not constitute a *bona fide* job for the purposes of determining wage-earning capacity. The Board finds her letter constituted a request for modification of OWCP's October 20, 1994 LWEC determination. Appellant's request for modification of the LWEC is not a request for reconsideration of the August 10, 2012 decision under 5 U.S.C. § 8128(a). Rather, she has requested modification of the October 20, 1994 LWEC determination based on her argument that it was in error.

On remand, OWCP shall adjudicate appellant's request for modification of the LWEC determination and issue a *de novo* decision, taking into consideration the provisions of FECA Bulletin No. 09-05.⁸

CONCLUSION

The Board finds that appellant requested modification of the October 20, 1994 LWEC determination.

⁵ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

⁶ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

⁷ See *D.O.*, Docket No. 11-1607 (issued April 23, 2012); *Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005); *Emmit Taylor*, Docket No. 03-1780 (issued July 21, 2004); *Gary L. Moreland*, 54 ECAB 638 (2003).

⁸ FECA Bulletin No. 09-05 (issued August 18, 2009) outlines OWCP's procedures when limited-duty positions are withdrawn pursuant to NRP. If, as in the present case, a formal LWEC decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.

ORDER

IT IS HEREBY ORDERED THAT the August 10, 2012 decision of the Office of Workers' Compensation Programs is set aside, and the case remanded for further proceedings consistent with this decision of the Board.

Issued: May 17, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board